IN THE

Supreme Court of the United States

October Term, 1976

No. 76-285

O/Y FINNLINES, LTD. and
ENSO-GUTZEIT O/Y,
Petitioners,

v.

LAWRENCE BUTLER,
Respondent,

BRIEF OF RESPONDENT BUTLER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Jurisdiction does not obtain as proceedings herein are not yet final, complete, nor dispositive of the controversy between the parties (see pp. 6-7 herein).

QUESTION PRESENTED

Where the Petitioner's Mate improvidently ordered longshoremen, over their protests, to move and stow a 13-ton counterweight on its 22-inch end into a

30-inch space, rather than stowing said counterweight flat, and the Mate further improvidently ordered the jammed counterweight pushed flush to the vessel's bulkhead, and the counterweight thereby fell, causing Respondent injury, was there not sufficient evidence of Petitioner's negligence for jury determination?

COUNTER STATEMENT OF THE CASE

Petitioner incorrectly suggests that the Mate's "instruction" (in fact orders) had no effect on "the method or means to be used to move the cargo" (Petition, pp. 2,7). When the Petitioner's Mate ordered the counterweight into the narrow space, necessarily this order had the following effect on "the method or means to be used to move the cargo": the counterweight could not be let down flat when it came into the hatch; the counterweight had to be moved upright on its narrow edge; pushing the counterweight upright required the fork-lift trucks to push blind from behind it; being pushed blind upright, the counterweight naturally jammed going into the narrow space required by the Mate. When jammed, the Mate also ordered that the counterweight be pushed flush against the bulkhead, two more feet. This Mate's order had the following effect on "the method or means to be used to move the cargo": the counterweight first had to be unjammed; the working capacity of the fork-lifts had been decreased, as only one fork-lift could be then used; a fork-lift could only unjam from one side of the upright counterweight.

Respondent requested trial by jury. There has been no jury decision on the negligence issue, as the Court of Appeals for the Fourth Circuit has now remanded this cause for trial by jury.

ARGUMENT

I. THERE IS NO GOOD REASON TO GRANT REVIEW

Herein, there is no conflict with any decision of this Court or another Circuit Court. There is no important question of federal law to decide.

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355, 360 (1962) held:

> "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury. As in cases under the Jones Act, 46 U.S.C.A. §688 (Schulz v. Pennsylvania R. Co., 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668; Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed. 2d 404) and under the Federal Employers' Liability Act, 45 U.S.C.A. §61 et seq. (Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Ellis v. Union Pacific R. Co., 329 U.S. 649, 653, 67 S.Ct. 598, 600, 91 L.Ed. 572; Dice v. Akron, C. & Y.R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398; Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 77 S.Ct. 443,

1 L.Ed.2d 493), trial by jury is part of the remedy. Thus the provisions of the Seventh Amendment noted above, are brought into play. Schulz v. Pennsylvania R. Co., supra, 350 U.S. at 524, 76 S.Ct. at 609. As we recently stated in another diversity case, it is the Seventh Amendment that fashions 'the federal policy favoring jury decisions of disputed fact questions.' Byrd v. Blue Ridge Rural Elec. Cooperative, 356 U.S. 525, 538, 539, 78 S.Ct. 893, 901, 2 L.Ed.2d 953. And see Herron v. Southern Pac. Co., 283 U.S. 91, 94-95, 51 S.Ct. 383, 384, 75 L.Ed. 857."

In Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 525, 610 (1956), the Court stated:

"In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and

sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G.R. Co., 1888, 128 U.S. 443, 445, 9 S.Ct. 118, 32 L.Ed. 478."

In United N.Y. & N.J. Sandy Hook Pilots Ass'n. v. Halecki, 358 U.S. 613, 618-619 (1959), the Court stated:

"The defendants owed a duty of exercising reasonable care for the safety of the (plaintiff) . . . It was for the trier of fact to determine whether the defendants were responsibly negligent in permitting or authorizing the method or manner..."

In Kermarec v. Campagnie, etc., 358 U.S. 625, 632 (1959), the Court held:

"We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests, the duty of exercising reasonable care under the circumstances of each case."

In West v. United States, 361 U.S. 118, 123 (1959), the Court stated:

"Of course, one aspect of the shipowner's duty to refrain from negligent conduct is embodied in his duty

> to exercise reasonable care to furnish a safe place to work."

West, supra, at p. 123 teaches that such shipowner liability is present with the shipowner's ". . .power either to supervise or to control. . ." or giving "orders". Herein, we have the following: the longshoremen could not put the counterweight flat as they desired, but were required to follow the Mate's order to stow the counterweight upright in the narrow space; the Mates acknowledged their duty to supervise, including safety; the Chief Mate was head of the loading operation; the Third Mate in the hatch was the Chief Mate's emissary; the Third Mate was inexperienced; the Chief Mate placed the Third Mate in the hatch, with the indicia of authority, knowing the Third Mate was inexperienced; the Chief Mate preferred that the counterweight be stowed flat; the Third Mate in the hatch acknowledged the risk of moving and stowing such a counterweight upright on its narrow end, but ordered this notwithstanding.

II. THERE IS NO JURISDICTION TO CONSIDER THE PETITION SINCE THE PROCEEDINGS ARE NEITHER FINAL NOR COMPLETE

The Court of Appeals for the Fourth Circuit has remanded this cause for trial by jury. A jury may find for petitioner or respondent. Thus, the question of negligence must be determined in a new trial. This cause is not complete nor final. It is not ripe for Supreme Court review.

In Arnold v. United States, 263 U.S. 427 (1923), the Court of Appeals modified the District Court's judgment, ordering another jury trial as to certain issues. Because the proceedings were not ready for review, this Court dismissed the petition for writ of certiorari for want of jurisdiction stating, 263 U.S. 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. Hamberg-American Packet Co., 148 U.S. 262, 264, 37 L.Ed. 443, 444, 13 Sup.Ct. Rep. 590; Collins v. Miller, 252 U.S. 364, 370, 64 L.Ed. 616, 618; 40 Sup. Ct.Rep. 347; Oneida Nav. Corp. v. W.&S. Job & Co., 252 U.S. 521, 522, 64 L.Ed. 697, 40 Sup.Ct.Rep. 357; and cases therein cited."

In finding absence of jurisdiction to consider the appeal, the Court stated in Keystone Manganese & Iron Co. v. Martin, 132 U.S. 91, 93 (1889):

> "The (Circuit Court) decree is not final, because it does not dispose of the entire controversy between the parties."

CONCLUSION

If any action is warranted, it is summary entry of judgment for respondent longshoreman.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the foregoing Brief of Respondent Butler in Opposition to Petition for a Writ of Certiorari were mailed postage pre-paid to Messrs. Charles F. Tucker and John B. King, Jr., Vandeventer, Black, Meredith & Martin, One Commercial Place, Norfolk, Virginia 23510, counsel for O/Y Finnlines, Ltd. and Enso-Gutzeit O/Y this 27th day of September, 1976.

Ralph Rabinowitz

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